STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER RUDY and ALICE RUDY,

Plaintiffs-Appellants,

v

DEVON HOLMBERG,

Defendant,

and

DALE McNINCH, M.D., and BUTTERWORTH HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
January 18, 2000

No. 214626
Kent Circuit Court
LC No. 97-012502 NM

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Plaintiffs appeal as of right from August 5 and September 18, 1998, orders granting summary disposition first to defendants McNinch and Butterworth Hospital and later defendant Holmberg. We affirm.

On May 13, 1994, at 9:30 p.m., defendant Holmberg arrested plaintiff Christopher Rudy ("plaintiff") for operating under the influence of alcohol and possession of marijuana after stopping plaintiff for speeding. Plaintiff was unconscious during the drive to the Kent County Sheriff's Department. Upon arrival he woke up to some extent, stepped out of the police car and staggered around requiring direction from defendant Holmberg. Plaintiff again lost consciousness and had to be dragged by defendant Holmberg and another officer into the building.

Defendant Holmberg obtained a search warrant for a blood sample to measure the level of alcohol in plaintiff's body. The nurse at the jail refused to take a blood sample and defendant Holmberg was told that he also would have to obtain medical clearance in order for plaintiff to be held in jail. Defendant Holmberg took plaintiff to defendant Butterworth to get the blood drawn and the medical

clearance. Plaintiff was for much of the time unconscious in the car on the way to defendant Butterworth.

Plaintiff was unconscious upon arrival at defendant Butterworth requiring three to four men to lift him out of the car and onto a gurney. Plaintiff remained unconscious until approximately 11:30 p.m. when he was taken to a hospital room where defendant Holmberg and three to four hospital staff attempted to move plaintiff from the gurney to a bed. Plaintiff, in the words of defendant Holmberg, "went ballistic," although plaintiff does not remember this incident. Plaintiff pushed a nurse away causing her to hit some hospital equipment. After some struggle plaintiff was put in restraints. The hospital nurse present in the room at that time described plaintiff as "very combative, verbal, and very combative."

Plaintiff remembers awakening in the room with defendant Holmberg and with his right arm handcuffed to the bed. He discovered at this time that he had urinated in his pants. Medical records indicate that a sedative was given to plaintiff at 11:50 p.m. At some point the hospital staff, including defendant McNinch, became concerned that plaintiff's violent behavior resulted from something other than the usually sedative marijuana and alcohol. Because of plaintiff's extreme behavior defendant McNinch thought it important to, sooner rather than later, investigate what drugs plaintiff had taken. A urine test was ordered because it was the quickest available method of discovering what drugs were in plaintiff's body. A catheter was used to get a urine sample from plaintiff either because he told hospital personnel that he was unable to give a sample or because his combative nature suggested that cooperation in obtaining a sample was unlikely. Blood and urine samples were obtained at 12:05 a.m. Medical records indicate that plaintiff fell asleep and was awake at 12:52 a.m. Plaintiff was discharged at 1:05 a.m.

Plaintiffs filed this lawsuit on December 2, 1997, alleging assault and battery and gross negligence by defendant Holmberg for his role in obtaining the urine sample without a warrant or consent, medical malpractice by defendants McNinch and Butterworth for failing to obtain consent before ordering the catheterization and assault and battery by defendants McNinch and Butterworth for the performance of the catheterization. Plaintiff Alice also alleged loss of consortium. On June 5, 1998, defendants McNinch and Butterworth moved the trial court for summary disposition alleging immunity under MCL 333.6508; MSA 14.15(6508) for performance of emergency medical treatment to protect an incapacitated person from injury. Defendant Holmberg filed a motion for summary disposition on August 10, 1998, also alleging immunity under MCL 333.6508; MSA 14.15(6508) as well as immunity as a government employee under MCL 691.1407(2); MSA 3.996(107)(2).

Defendants McNinch's and Butterworth's motion for summary disposition was heard on July 17, 1998. The trial court orally granted the motion from the bench and signed an order on August 5, 1998, dismissing the claims pursuant to MCR 2.116(C)(7). Defendant Holmberg's motion for summary disposition was heard on September 4, 1998. The trial court granted defendant Holmberg's motion pursuant to MCR 2.116(C)(7) and (C)(10) stating that he had the same immunity as defendant McNinch and also did not act grossly negligent. Plaintiffs' appeal of those two orders is currently before this Court.

This Court reviews the circuit court's grant of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). Plaintiffs challenge the trial court's orders dismissing the claims against all defendants on the basis of immunity extended by MCL 333.6501(5); MSA 14.15(6501)(5) and the trial court's determination that defendant Holmberg was not grossly negligent. Whether plaintiffs' claims against the three defendants should have been dismissed by the trial court is a two part analysis. The questions to ask are: first, are defendants' actions governed by MCL 333.6501; MSA 14.15(6501) and MCL 333.6502; MSA 14.15(6502) and therefore allowed by law and, second, whether defendants' actions were such, i.e., not gross negligence or willful and wanton misconduct, so as to extend immunity to defendants for those acts under MCL 333.6508; MSA 14.15(6508).

The trial court found that defendants' actions were governed by MCL 333.6501(5); MSA 14.15(6501)(5). That section states:

> An individual arrested by a law enforcement officer for the commission of a misdemeanor punishable by imprisonment for not more than 3 months, or by a fine of not more than $500.00, or both, may be taken to an approved service program or an emergency medical service for emergency treatment if the individual appears to be incapacitated at the time of apprehension. This treatment is not in lieu of criminal prosecution of the individual for the offense with which the individual is charged, nor shall it preclude the administration of any tests as provided for by law.

The questions that need to be answered to determine whether defendants' acts are governed by this statute are: was plaintiff arrested by a law enforcement officer, was he arrested for committing a misdemeanor punishable by no more than three months and/or a $500 fine, was plaintiff incapacitated at the time of the arrest, and was he taken to a facility for emergency treatment.

Plaintiff was arrested two hours before arriving at the hospital for the misdemeanor of operating under the influence of liquor, an offense punishable by not more than ninety days in jail or a $500.00 fine. MCL 257.625(4); MSA 9.2325(4). As for his capacity to function that evening, "incapacitated," as used in MCL 333.6501 is defined as

> an individual, as a result of the use of alcohol, is unconscious or has his or her mental or physical functioning so impaired that he or she either poses an immediate and substantial danger to his or her own health and safety or is endangering the health and safety of the public. MCL 333.6104; MSA 14.15(6104).

Plaintiff stated during a deposition that he was unconscious in the car on the way to the hospital until he woke up handcuffed to the hospital bed. Plaintiff further stated that he urinated in his pants when he was unconscious in the police car on the way to the hospital. And plaintiff's temperature and vital signs were taken at the hospital, although he denies remembering having his pulse, heart rate, temperature or blood pressure taken. Therefore, presumably, he was unconscious when he was initially examined at the hospital. Further, defendant Holmberg reported plaintiff unconscious in his car on the way to and at the jail after his arrest.

As noted above, substantial evidence has been presented that plaintiff was unconscious for much of the time after his arrest at 9:30 p.m. until his discharge from the hospital at 1:00 a.m. Further, defendant Holmberg and personnel of defendant Butterworth testified to violent behavior on the part of plaintiff after he arrived at the hospital.

The final question to consider from MCL 333.6501(5); MSA 14.15(6501)(5) is whether plaintiff was taken to a facility for emergency treatment. The evidence presented by the parties suggests that defendant Holmberg was directed by the nurse at the jail to take plaintiff to a medical facility for examination by a doctor before he could be detained at the jail. While defendant Holmberg's concern seemed to be with getting plaintiff's blood drawn to facilitate plaintiff's arrest for driving while intoxicated, the officer eventually took plaintiff to defendant Butterworth for the medical attention demanded by the jail nurse.

Under its own terms, MCL 333.6501(5); MSA 14.15(6501)(5) does not require that an arrestee need medical attention, but only requires that an officer takes the arrestee to a facility for treatment. However, MCL 333.6502(2); MSA 14.15(6502)(2) indicates when medical attention is necessary for a person brought to a medical facility. That section states in part that "[a]n individual who, by medical examination, is found to be incapacitated shall then receive treatment from an approved service program or emergency medical service." Defendant McNinch and the hospital nurse thought plaintiff needed some initial care to determine whether further treatment was necessary.

Further, this Court previously articulated when medical care is appropriate for an intoxicated person in *Smith v Westland*, 158 Mich App 132; 404 NW2d 214 (1986), and *Brewer v Perrin*, 132 Mich App 520; 349 NW2d 198 (1984). Both of these cases involve intoxicated prisoners who died soon after their arrest after hanging themselves in their cells. This Court held that a jail official's actions would be deliberately indifferent if he did not obtain medical attention for an intoxicated prisoner exhibiting assaultive, violent behavior. *Smith*, *supra* at 136-137. Defendant Holmberg, defendant McNinch, the hospital nurse, and the hospital medical records all attested to plaintiff's violent behavior.

The second step in the analysis of this appeal is whether defendants' acts were grossly negligent or willful and wanton misconduct so as to deprive them of the immunity from liability. Whether immunity is available for defendants is governed by MCL 333.6508(1) and (2); MSA 14.15(6508)(1) and (2) which state:

> (1) A law enforcement officer, a member of the emergency service unit, or staff member of an approved service program or an emergency medical service who acts in compliance with this part is acting in the course of his or her official duty and is not criminally or civilly liable therefor.
>
> (2) Subsection (1) does not apply to a law enforcement officer, member of the emergency service unit, or staff member of an approved service program or an emergency medical service who, while acting in compliance with this part, engages in behavior involving gross negligence or willful and wanton misconduct.

Defendants contend that the decision to obtain a urine sample via catheterization without plaintiff's consent was not only not negligent nor misconduct but was the only available way to properly treat plaintiff. Defendant McNinch stated that a urinalysis was the only way to discover in a short period what drugs plaintiff had taken. Defendants further stated that plaintiff's inability or unwillingness to cooperate with medical personnel left them with no way to obtain a urine sample other than through catheterization. The deposition testimony by defendant Holmberg, defendant McNinch, and the hospital nurse, coupled with the medical records and plaintiff's testimony of not remembering anything until he woke up restrained to the bed, indicate that plaintiff was uncooperative. Plaintiffs' counsel himself stated that plaintiff could not voluntarily give a urine sample.

For the above reasons, defendants' actions fit squarely under MCL 333.6501(5); MSA 14.15(6501)(5) and were not grossly negligent nor willful misconduct; therefore the immunity from civil and criminal liability extended by MCL 333.6508; MSA 14.15(6508) applies.

Affirmed.

/s/ David H. Sawyer
/s/ Roman S. Gribbs
/s/ Gary R. McDonald